IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re Enron Corporation Securities Litigation	§	
	§	
Mark NEWBY, Plaintiff,	§	
	§	
v.	§	Consolidated Lead No. H-01-3624
	§	
ENRON CORP., et al., Defendants.	§	
	§	

DEFENDANT ARTHUR ANDERSEN LLP'S OPPOSITION
TO LEAD PLAINTIFF'S EX PARTE APPLICATION FOR A
TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

533

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Cases **Page**

Cases **Page**

Statutes & Rules

Other Authorities

DEFENDANT ARTHUR ANDERSEN LLP'S OPPOSITION
TO LEAD PLAINTIFF'S EX PARTE APPLICATION FOR A
TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Defendant Arthur Andersen LLP ("Andersen LLP") submits this memorandum in opposition to Lead Plaintiff's Ex Parte Application for a Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction to Enjoin Defendant Andersen's Breakup ("Ex Parte App.") For all the reasons set forth below, the motion should be denied in its entirety.

INTRODUCTION

With no legal or factual basis, Lead Plaintiff the Board of Regents of the University of California ("Lead Plaintiff" or "the Regents") seeks: (1) a temporary restraining order preserving the "status quo" of defendants Andersen LLP, Andersen Worldwide Société Coopérative ("Andersen S.C."), and "Andersen's member firms and affiliates," and "enjoining Andersen's efforts to dissolve or spin off businesses"; and (2) an Order to Show Cause why a preliminary injunction should not issue. See Ex Parte App. at 1.[1]

Notwithstanding the Regents' attempt to avoid its application, the relief sought in this motion is barred as a matter of law by the Supreme Court's decision in Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999). Grupo Mexicano could not be more clear: where the underlying action states no cognizable equitable claim and seeks, instead, only money damages, no

[1]The Regents use the generic name "Andersen" to mean not just Andersen LLP, but also Andersen SC and all "member firms and affiliates", apparently without limitation. See Ex Parte App. at 1. This approach misleadingly blurs the legal distinctions between these entities, as discussed in more detail in Part II of this brief. The only one of these entities before the Court on this motion is Andersen LLP, a limited liability partnership organized under the laws of the State of Illinois.

preliminary equitable relief will issue. The Regents' total failure to address Grupo Mexicano in any substantive way – and their insistence that somehow the "extraordinary circumstances" of this case justify an injunction, notwithstanding controlling Supreme Court precedent to the contrary – is at best perplexing and at worst a tacit admission that their motion is meritless.

But even if Grupo Mexicano did not bar the relief sought, this motion would still have to be denied because plaintiffs have failed to discharge their heavy burden of showing that they are entitled to the extreme relief they seek. Ostensibly, the motion is brought to preserve assets that would be required to satisfy a judgment in the event that the damages sought by the movant in the Consolidated Amended Complaint are awarded. As Lead Plaintiff must be well aware, however, the preliminary relief it seeks would have exactly the opposite effect. The value of Andersen LLP's assets is diminishing daily and the only way Andersen LLP can hope to extract any value from them is if it is free to transfer them to willing purchasers. The longer Andersen LLP is forced to delay such transfers, the less desirable the assets will become to any prospective purchaser, and the less likely any value at all will be realized.

Moreover, most of the putative "facts" proffered in support of the motion have nothing to do with the elements the Regents must prove to obtain preliminary relief. Specifically, the Regents fail to show that they would suffer any irreparable harm absent an injunction, much less that such harm would outweigh the significant countervailing harm to Andersen LLP if the injunction were to issue. Most importantly, the Regents fail to provide any evidence that Andersen LLP is trying to conceal or dissipate assets, instead offering only unsupported, conclusory allegations that Andersen LLP seeks to

avoid a judgment. Finally, the Regents do not even attempt to show that issuance of an injunction would not run counter to the public interest. The instant application should be denied in its entirety.

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF AS A MATTER OF LAW

The Supreme Court's decision in Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999), is directly on point. It provides that a federal court lacks the power to grant pre-judgment injunctive relief unless the underlying complaint states a cognizable equitable claim having some nexus to the preliminary relief sought. Although Judge Rosenthal addressed this very issue at length in Newby v. Enron Corp., 2002 WL 200956 (Jan. 9, 2002, S.D. Tex.) – a proceeding brought by the Regents' own counsel and which is the law of this case – the Regents cite Newby only once in a terse parenthetical, incorrectly claiming that Newby stands for the vastly overbroad proposition that a "district court may consider [an] application for a temporary restraining order in [a] class action securities litigation." Ex Parte App. at 10. However, in Newby, Judge Rosenthal found after a careful analysis that Grupo Mexicano did not preclude her from considering an application for a temporary restraining order because the threshold of Grupo Mexicano was met on the facts before her; that is, as to certain of the defendants who were the subject of plaintiff's TRO application, Judge Rosenthal found that a cognizable equitable claim had been asserted and that a nexus existed between that claim and the equitable relief sought.

Applying the same analysis to the claims asserted against Andersen LLP, as is done below, leads precisely to the opposite conclusion. Indeed, here, the Regents make no attempt to articulate any cognizable equitable claim against Andersen LLP, much less one with a nexus to the relief now sought. Nor are any such claims evident from the face of the recently amended complaint. Moreover, the cases the Regents rely upon in trying to evade Grupo Mexicano and Newby are inapposite and unavailing.

A. Lead Plaintiff Does Not Assert A Cognizable Equitable Claim Against Andersen LLP

In Grupo Mexicano, the Supreme Court held that prior to entry of a money judgment in an action for damages, federal courts lack the power to issue an injunction preventing the alleged debtor from transferring assets in which plaintiff has no equitable interest. Thus, when a plaintiff makes no claim sounding in equity, no preliminary injunction can issue. Tracing the history of the federal courts' equitable powers, the Supreme Court confirmed "the well-established general rule that a judgment establishing the debt was necessary before a court of equity would interfere with the debtor's use of his property." Grupo Mexicano, 527 U.S. at 321. This rule is based on the principle that a general creditor (i.e., one without a judgment) has "no cognizable interest . . . in the property of his debtor, and therefore [can]not interfere with the debtor's use of that property." Id. at 320 (noting that otherwise a "fruitless and oppressive interruption of the exercise of the debtor's rights" could result (citation and internal quotation marks omitted)).

Although the Regents accord it very short shrift, Judge Rosenthal's decision in Newby provides an instructive application of the Supreme Court's holding in Grupo Mexicano. In Newby, plaintiffs sought "a temporary restraining order against twenty-nine current and former officers, inside directors,

and outside directors of Enron Corporation, 'freezing' the proceeds from their sales of Enron securities from October 19, 1998 to November 27, 2001." Newby, 2002 WL 200956, *1. In deciding the motion, Judge Rosenthal made clear that, under Grupo Mexicano, district courts lack the authority to entertain applications for temporary restraining orders or preliminary injunctions unless the underlying complaint itself seeks "cognizable equitable relief." Newby, 2002 WL 200956, *6. This requirement was also articulated in Rahman v. Oncology Associates, P.C. 198 F.3d 489, 496 (4th Cir. 1999), which held:

> [W]here a plaintiff creditor has no lien or equitable interest in the assets of a defendant debtor, the creditor may not interfere with the debtor's use of his property before obtaining judgment. A debt claim leads only to a money judgment and does not in its own right constitute an interest in specific property. Accordingly, a debt claim does not, before reduction to judgment, authorize prejudgment execution against the debtor's assets.
>
> On the other hand, when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim invoke equity to preserve the status quo pending judgment where the legal remedy might prove inadequate and the preliminary relief furthers the court's ability to grant the final relief requested. This nexus between the assets sought to be frozen through an interim order and the ultimate relief requested in the lawsuit is essential to the authority of a district court in equity to enter a preliminary injunction freezing assets.

Rahman, 198 F.3d at 489 (emphasis added.)

Applying this analysis, Judge Rosenthal explored the historical elements of the equitable relief actually sought against the respondents on that motion – namely, a constructive trust and an accounting – to determine whether those elements were adequately alleged. Newby, 2002 WL 200956, *11-15. The Court found that while it was questionable whether plaintiffs had adequately alleged the "tracing requirement" necessary for imposing a constructive trust, id. at *14, they had adequately stated a

cognizable equitable claim for an accounting, inasmuch as the remedy they sought was disgorgement of profits allegedly earned from insider trading. Id. at *5. Judge Rosenthal also found a sufficient "nexus" to exist between the claim for an accounting and the assets sought to be frozen. Id. Notwithstanding these findings (which enabled plaintiffs to surmount the threshold hurdle of Grupo Mexicano), however, Judge Rosenthal denied the application because plaintiffs had failed to proffer sufficient evidence of a substantial threat of irreparable injury. Id. at *15-17.

A number of district court cases on which Judge Rosenthal relied emphasize the requirement that plaintiffs demonstrate a cognizable equitable claim before a court may issue a prejudgment injunction. Id. at *6 n.6 (citing cases). Disregarding Grupo Mexicano, Newby, and all of this other authority, however, the Regents have not even attempted to argue that they have a cognizable equitable claim against Andersen LLP. Indeed, they concede that their claims against Andersen LLP seek only money damages, in that they rely almost exclusively on pre-Grupo Mexicano cases granting preliminary equitable relief where no final equitable relief is sought. See Ex Parte App. at 9, 14 and cases cited therein. The Regents cannot avoid controlling Supreme Court authority, or the law of the case, simply by ignoring them.

Even if one looks beyond the motion papers to Lead Plaintiff's recently amended complaint, no cognizable equitable claim against Andersen LLP can be found. The prayer for relief evidences, as a general matter, the following equitable remedies: (i) an accounting for insider trading proceeds; (ii) a

constructive trust and/or asset freeze of insider trading proceeds; (iii) disgorgement of insider trading proceeds; (iv) restitution of monies of which plaintiffs were allegedly defrauded; and (v) rescission.[2]

However, the first three of these remedies are, on their face, inapplicable to Andersen LLP; they pertain specifically to "proceeds" allegedly derived from "insider trading," and there is no allegation anywhere in the complaint that Andersen LLP ever traded in any Enron securities, much less that it traded based on any material non-public information, or improperly earned any "proceeds" from such trades. Indeed, the specific count in the complaint setting out Lead Plaintiff's insider trading claim is alleged only against "the Enron defendants that sold Enron stock during the class period" and not against Andersen LLP. See Compl., ¶¶ 998-1004.

The Regents likewise cannot state a cognizable equitable claim against Andersen LLP for restitution or rescission. Merely labeling a damages remedy "restitution" or "rescission" does not in itself give rise to a cognizable equitable claim. With respect to restitution, the Supreme Court recently

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[2]The prayer for relief reads, in relevant part, as follows:

. . .

B. Awarding preliminary and permanent injunctive relief . . . including an accounting of and the imposition of a constructive trust and/or an asset freeze on defendants insider trading proceeds;

C. Ordering an accounting of defendants' insider trading proceeds;

D. Disgorgement of defendants' insider trading proceeds;

E. Restitution of investors' monies of which they were defrauded;

F. Awarding compensatory damages in favor of plaintiffs and the other class members against all defendants, jointly and severally, for all damages sustained as a result of defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

G. As to the § 11 and/or § 15 claims, awarding rescission or a recessionary [sic] measure of damages;

. . .

made this point clear in Great-West Life & Annuity Ins. Co., v. Knudson, 122 S. Ct. 708 (2002). There, the plaintiff benefit plan sought "restitution" from a plan beneficiary of monies paid to that beneficiary by a third party tortfeasor. The plaintiff purported to bring its claim under a provision of ERISA allowing plan participants and fiduciaries to bring civil actions for "appropriate equitable relief." The Supreme Court affirmed summary judgment denying the claim on the ground that, despite being called "restitution," the relief sought by plaintiff was not equitable at all, but legal. Specifically, the Cour held that

> not all relief falling under the rubric of restitution is available in equity. In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity. Thus, restitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case, and whether it is legal or equitable depends on the basis for the plaintiff's claim and the nature of the underlying remedies sought.

Great-West Life, 122 S. Ct. at 714 (emphasis added) (citations omitted.) The Court further held that

> [i]n cases in which the plaintiff . . . might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him, the plaintiff had a right to restitution at law through an action derived from the common law writ of assumpsit. In such cases, the plaintiff's claim was considered legal because he sought to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money.

Id. (emphasis in original) (citations omitted.)

By contrast, the Court held that restitution is available in equity (as opposed to law) only "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." Id. Indeed, as the Court explained

> for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession.

Id. at 714-15. Thus, a plaintiff has no equitable action for restitution unless it can show that is seeks to restore to itself particular, identifiable property that rightfully belongs to it.[3]

In this case, the Regents do not, and cannot, allege that the damages they seek from Andersen LLP are specific funds that "belong in good conscience" to them, much less that those funds could be "traced" from them to Andersen LLP. And as the Court in Great-West Life noted, "suits seeking . . . to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from defendant's breach of legal duty." Id. at 713 (citation omitted.) There is, therefore, no cognizable equitable claim for restitution alleged against Andersen LLP in this action.

The Regents likewise have not, and cannot, assert any equitable claim against Andersen LLP for rescission. As an initial matter, "rescission" is defined as "a party's unilateral unmaking of a contract for legally sufficient reason . . . [which] restores the parties to their pre-contract positions." Black's Law Dictionary, West Publishing (1996). Since the Regents have alleged no contract between any member of the class and Andersen LLP, there is simply no basis for asserting a claim for rescission against Andersen LLP.

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[3]The Court noted that while its prior decisions "have not previously drawn this fine distinction between restitution at law and restitution in equity, . . . neither have they involved an issue to which the distinction was relevant. Great-West Life, 122 S. Ct. at 715. Like the issues at stake in Great-West Life, the distinction is crucially important here, in determining whether plaintiff has satisfied the requirements of Grupo Mexicano.

The fact that the Regents seek a "rescissionary measure of damages" under Section 11 of the Securities Act of 1933 in the alternative to "rescission" per se does not change this analysis. Were it otherwise, a plaintiff would successfully state a cognizable equitable claim simply by asking for its money damages claim to be assessed by the "rescissionary measure." This is plainly not, in the words of Judge Rosenthal, an "equitable claim[] historically available." Newby, 2002 WL 200956 at *11. Just as the claim under Section 11 could not support the temporary restraining order sought before Judge Rosenthal, it cannot support the relief sought here. Id. at *18, n.7.

The Regents seek to avoid this result, and to ignore Judge Rosenthal's holding in Newby, by relying inappropriately on Deckert v. Independence Shares Corp., 311 U.S. 282 (1940). According to the Regents, Deckert stands for the proposition that district courts may, in an action brought under the securities laws, grant any kind of equitable relief they choose, regardless of whether such relief otherwise conforms with Grupo Mexicano. Ex Parte App. at 9-10. This is far too broad a reading of Deckert. While Deckert did hold that actions under the securities laws could in appropriate circumstances include equitable – and not merely legal – relief, the Court also found specifically that the complaint in issue made out an equitable claim. Indeed, as the Court later recognized in Grupo Mexicano, the preliminary relief granted in Deckert was permissible precisely because "the bill state[d] a cause [of action] for equitable relief." Grupo Mexicano, 527 U.S. at 325 (citing Deckert, 311 U.S. at 288.) And as the Deckert Court stated:

> The principal objects of the suit are rescission of the [contracts] and restitution of the consideration paid. . . . That a suit to rescind a contract induced by fraud and to recover the consideration paid may be maintained in equity, at least where there are circumstances making the legal remedy inadequate, is well established.

Deckert, 311 U.S. at 289. Moreover, Deckert's holding was clearly intended, to permit courts to grant equitable relief under the securities laws only where an equitable claim could otherwise properly be stated:

> We think the [Securities] Act as a whole indicates an intention to establish a statutory right which the litigant may enforce . . . by such legal or equitable actions or procedures as would normally be available to him.

Id. at 287-88 (emphasis added.) Any argument that Deckert somehow supports Lead Plaintiff's failure to comport with Grupo Mexicano therefore fails. In short, the Regents' action against Andersen LLP consists entirely in claims at law for money damages; preliminary equitable relief is therefore barred under Grupo Mexicano.

Moreover, even where a cognizable equitable claim is alleged, the party seeking preliminary relief must show a "nexus" between the preliminary relief sought and the equitable claim. See Newby, 2002 WL 200956, at *6 (even if plaintiffs show a cognizable claim in equity, "they must show a sufficient nexus between the assets sought to be frozen and the equitable relief plaintiffs request"). See also DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 220 (1945) (denying preliminary injunction to restrain assets from being transferred out of the country because it concerned "a matter lying wholly outside the issues in the suit").

Since no such equitable claim is alleged against Andersen, the "nexus" prong of the Supreme Court's decisions is not even properly addressed and trying to do so demonstrates the futility of the Regents' claim on this motion. These equitable claims all ultimately demand the return of monies allegedly wrongfully obtained through insider trading. Yet, the relief requested in the instant motion

seeks to enjoin "Andersen's efforts to dissolve or spin-off divisions or businesses." Ex Parte App. at 1. The equitable claims for relief alleged in the complaint are not alleged against Andersen at all and therefore the preliminary relief sought here simply could not and does not bear any relation, let alone a "nexus" to the equitable claims. The Regents have plainly failed to satisfy Grupo Mexicano. The preliminary relief they seek should be denied.

B. Requesting an Injunction to "Maintain the Status Quo" Does Not Render Grupo Mexicano Inapplicable

The Regents attempt to justify their avoidance of Grupo Mexicano and Newby by relying on Walczak v. EPL Prolong, Inc., 198 F.3d 725 (9th Cir. 1999).[4] Citing Walczak, the Regents assert that, notwithstanding Grupo Mexicano, a district court may enter an injunction "to preserve the status quo and prevent the 'irreparable loss of rights before judgment,' including the right to collect on a future judgment." Ex Parte App. at 9. Specifically, they argue that "where a district court does not order an asset freeze, but instead enjoins a plan of liquidation or orders a company to maintain the status quo," the injunction is distinguishable from that sought in Grupo Mexicano. Ex Parte App. at 13. Walczak does not support Lead Plaintiff's position.

First, on its facts, Walczak does not create the exception to Grupo Mexicano urged by the Regents. In Walczak, the Ninth Circuit preliminarily enjoined the liquidation of a corporation, in the context of a derivative action brought by a minority shareholder against, inter alia, members of the

[4]The Regents also cite cases pre-dating Grupo Mexicano, the reliability of which is highly questionable given the clear pronouncements of the Supreme Court in that case. See generally Ex Parte App. at 9-14.

corporation's board for breach of fiduciary duty – i.e., a cognizable equitable claim. The Walczak court specifically stated that "the district court properly issued the preliminary injunction based on Walczak's breach of fiduciary duty claim." Walczak, 198 F.3d at 732 (emphasis added.) The Ninth Circuit further explained:

> After reviewing the evidence, the district court held that, with respect to the fiduciary duty claim, Walczak demonstrated a strong likelihood of success on the merits and the possibility of irreparable injury. . . . Accordingly, the court issued the preliminary injunction in favor of Walczak.

Id. (emphasis added). See also id. at 733 (reiterating yet again that the decision was predicated upon the district court's conclusions with respect to the plaintiff's claim for equitable relief.) Unlike the Regents' action therefore, the plaintiff in Walczak did assert a cognizable equitable claim with respect to which preliminary relief could appropriately be granted. Moreover, the "nexus" requirement imposed by Grupo Mexicano and explained by Judge Rosenthal in Newby was also satisfied on the facts of Walzcak; plaintiff's final equitable claim for breach of fiduciary duty in that case alleged wrongful dissipation of the very corporate assets the preliminary injunction was intended to protect. As discussed earlier, no such "nexus" exists in this case.

Second, there is nothing in Walczak justifying the dubious distinction between an "asset freeze" and "maintaining the status quo" on which the Regents rely. Such a distinction is simply non-sensical; indeed, a number of courts speak of "maintaining the status quo" and "freezing assets" without so much as a hint of a distinction between the two. See, e.g., Rahman, 198 F.3d 489 (court may "invoke equity to preserve the status quo" by "enter[ing] an injunction to freeze assets"); Federal Savings & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 562 (5th Cir. 1987) (describing case "upholding preliminary injunction

freezing a corporation's assets in order to preserve the status quo and future equitable remedies") (citing Meis v. Sanitas Service Corp., 511 F.2d 655 (5th Cir. 1975); Fairview Machine & Tool Co., Inc. v. Oakbrook Int'l Inc., (D. Mass. 1999) (discussing Rahman and Grupo Mexicano and holding that "asset freezing preliminary injunctions remain available to preserve the status quo in aid of the ultimate equitable relief claimed") (citations omitted). The Regents have cited no case other than Walczak suggesting such a distinction, and the fact that Walczak fully conforms to the requirements of Grupo Mexicano makes its discussion of this issue meaningless dicta. Indeed, the false distinction the Regents try to draw is particularly inappropriate here given the virtually boundless scope of the relief requested and the nature of Andersen's business. In Walczak, the plaintiff sought to enjoin a single proposed transaction, the consummation of which would have resulted in the total liquidation of the company in which he had an ownership interest and on whose behalf he was asserting derivative claims. In this motion, by contrast, the Regents – who have no legal or equitable financial interest in Andersen – seek to enjoin the transfer of any Andersen line of business. As a professional services firm, the assets of Andersen LLP consist precisely in the personnel who comprise them and who perform the various services offered. In this very real sense, therefore, the broad injunctive relief sought by the Regents is nothing other than an "asset freeze," regardless of the label the Regents choose to ascribe to it.

In sum, the Regents' motion epitomizes the concerns articulated by the Supreme Court in Grupo Mexicano. As the Court explained, allowing a pre-judgment injunction in cases seeking purely monetary damages would encourage a race to the courthouse among creditors in every case involving a

defendant with financial difficulties. Grupo Mexicano, 527 U.S. at 331. Such competition would have unfortunate consequences and "might prove financially fatal to the struggling debtor." Id. Thus, as the Supreme Court noted, the requirement of a prior judgment acts as a "fundamental protection" in debtor-creditor law. Id. at 330. The Court observed:

> A rule of procedure which allowed any prowling creditor, before his claim was definitely established by judgment, and without reference to the character of his demand, to file a bill to discover assets, or to impeach transfers, *or interfere with the business affairs of the alleged debtor*, would manifestly be susceptible of the grossest abuse.

Id. (quoting F. Wait, FRAUDULENT CONVEYANCES AND CREDITORS' BILLS § 73, at 110-11 (1884) (emphasis added). The Regents have chosen to ignore these clear pronouncements. Their motion should be denied as a matter of law.

II. PLAINTIFFS FAIL TO SATISFY THE TEST FOR PRELIMINARY INJUNCTIVE RELIEF

A preliminary injunction "is an extraordinary equitable remedy", Sugar Busters LLC v. Brennan, 177 F.3d 258, 265 (5th Cir. 1999), which should not be granted lightly. To obtain such relief, Lead Plaintiff must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury should the relief be denied; (3) that the threatened injury outweighs damage that granting the relief might cause the defendant; and (4) that granting the relief will not harm the public interest. See Women's Med. Ctr. v. Bell, 248 F.3d 411, 419 n.15 (5th Cir. 2001); Enrique Bernat F., S.A. v. Guadalajara, Inc., 210 F.3d 439, 442 (5th Cir. 2000). The movant bears the "heavy burden of persuading the district court that all four elements are satisfied." Hardin v. Houston Chronicle Publ'g

Co., 572 F.2d 1106, 1107 (5th Cir. 1978) (affirming denial of preliminary injunction). Lead Plaintiff fails to discharge this burden.

A. Lead Plaintiff Has Not Demonstrated a Substantial Likelihood of Success on the Merits

A successful 10(b) or Rule 10b-5 claim requires a plaintiff to demonstrate, in connection with the purchase or sale of securities, a misleading statement or omission of material fact, made with scienter, upon which plaintiff relied, that proximately caused injury to the plaintiff. See Nathenson v. Zonagen Inc., 267 F.3d 400, 406-07 (5th Cir. 2001). Scienter requires "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976). To have the requisite scienter, a defendant must have known that the misstatements were false at the time they were made. See San Leandro Emergency Med. Plan v. Philip Morris Cos., 75 F.3d 801, 812-13 (2d Cir. 1996).

Although Lead Plaintiff grossly mischaracterizes the caselaw by claiming that courts have adopted a "per se" rule that misrepresentation of financial performance automatically constitutes a material misstatement, see Ex Parte App. at 12, Andersen LLP is willing to assume, for purposes of this motion only, that there were material misstatements of the kind alleged. Even accepting this assumption, however, Lead Plaintiff's application presents no evidence that would show a likelihood of success on the merits because it has not made any showing of scienter. Lead Plaintiff erroneously asserts that "the magnitude of the Enron fraud, Andersen LLP's destruction of documents, and the pleading of the Fifth Amendment by Andersen partners" suffice to support an inference of scienter, but none of these allegations, even taken together is sufficient.

First, the magnitude of alleged fraud does not in itself necessarily support an inference of scienter. See Cheney v. Cyberguard Corp., 2000 WL 1140306, at *12 (S.D. Fla. July 31, 2000) ("the magnitude of the restatement does not, without evidence that the auditor was aware of the falsity of the original statements, raise an inference of scienter"). To hold otherwise would substitute materiality for scienter, which is clearly inappropriate. Second, Lead Plaintiff's reference to document destruction is a red herring. While it is true that some documents were destroyed at Andersen LLP's offices, the Regents have cited no case law for the proposition that destruction of documents is itself sufficient evidence of scienter. And there is no evidence to show that the documents destroyed reflected knowledge at the time of issuance that Andersen's opinions were false. Similarly, the fact that Andersen LLP partners invoked their Fifth Amendment rights at depositions which themselves were limited by Court Order to document destruction issues[5] does not support any inferences regarding the substantive allegations of securities fraud at issue in this lawsuit. Indeed, one of the two deponents referenced by Lead Plaintiff, Nancy Temple, was not even a member of the Enron audit team and performed no substantive work for Enron.

Moreover, even if the Regents could establish a likelihood of success on the merits of any of the claims actually alleged against Andersen LLP, they still could not establish a likelihood of success as to any "cognizable equitable claim" against Andersen LLP because no such equitable claim is asserted. See Part I, supra. Yet, a cognizable equitable claim is what must underpin any pre-judgment injunctive

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[5]See Order Prohibiting the Destruction of Evidence, Granting Limited Discovery, and Providing Other Relief Regarding Arthur Andersen (January 23, 2002).

relief. Grupo Mexicano, 527 U.S. 308; Newby, 2002 WL 200956. Therefore, the Regents cannot satisfy even the first prong of the test for preliminary relief, and their motion should be denied.

B. Lead Plaintiff Fails to Show a Substantial Threat of Irreparable Injury Should the Relief Be Denied

Lead Plaintiff has likewise failed to show any threat, much less a substantial threat, of irreparable injury if injunctive relief is denied. Lead Plaintiff's attempt to describe the harm it would suffer absent an injunction amounts to a simple complaint that Andersen LLP's pockets are not as deep as Lead Plaintiff would like them to be. Lead Plaintiff asserts that "[a]n order granting injunctive relief is necessary to ensure Andersen LLP can satisfy a probable judgment rendered against it arising from the Enron securities fraud litigation," and repeats this theme throughout. Ex Parte App. at 1; see also id. at 14, 15. Such concerns clearly do not provide a sufficient basis for the "extraordinary equitable remedy" of a preliminary injunction. Sugar Busters, 177 F.3d at 265. As Judge Rosenthal noted when denying a similar injunction in these consolidated proceedings just three months ago, "A prejudgment asset freeze is not available in a case simply because the potential equitable award is likely to exceed

available assets." Newby, 2002 WL 200956, at *16.[6] Yet Lead Plaintiff offers no other basis for its motion.

Preliminary injunctive relief generally requires evidence that the non-moving party is intentionally trying to hide or dissipate assets in order to prevent collection of a future judgment against it. See Newby, 2002 WL 200956, at *15-16 (citing cases); Republic of Panama v. Air Panama Internacional, S.A., 745 F. Supp. 669, 674 (S.D. Fla. 1988) (finding that if parties were not enjoined from transferring assets, property likely would be beyond reach of Lead Plaintiff and the court, and "irretrievably dissipated and lost"). "In the cases in which such a prejudgment asset-freezing injunction is granted, the courts have been presented with allegations and evidence showing that the defendants were concealing assets, were transferring them so as to place them out of the reach of postjudgment collection, or were dissipating the assets." Newby, 2002 WL 200956, at *15. But Lead Plaintiff fails to deliver any evidence to suggest such activity in this case. The Regents' Motion is strikingly devoid of even a colorable allegation that Andersen LLP is attempting to conceal or dissipate assets in order to frustrate a possible future judgment. Likewise, there has been no suggestion that if Andersen LLP in

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[6]Largely ignoring Judge Rosenthal's decision in Newby, Lead Plaintiff disingenuously cites an unpublished opinion by Judge Rosenthal issued five years earlier to the effect that "The Supreme Court has held that a preliminary injunction may be appropriate when it is shown that the defendant is likely to be insolvent at the time of judgment." Ex Parte App. at 13 (citing Bank of Montreal v. Sun Energy Co., No. H-93-3459 1994 WL 240792, *1 (March 24, 1994, S.D. Tex.). As an initial matter, Bank of Montreal was decided in 1994, prior to the Supreme Court's clarification of these issues in Grupo Mexicano. See supra Part I. More importantly, however, the plaintiff in that case sought final equitable relief (in the form of specific performance of an assignment of mortgage payments), a fact which Judge Rosenthal expressly considered in determining whether preliminary relief was appropriate. Bank of Montreal, 1994 WL 240792 at *1 ("The court may exercise its equitable power to order a preliminary injunction to secure an equitable remedy" (emphasis added.))

fact disposes of any "asset," it will not receive fair value in exchange for it.[7] None of the myriad articles attached to Lead Plaintiff's motion discloses any such intent – even assuming multiple hearsay press reports were an acceptable evidentiary basis for measuring the threat of injury, which they are not.[8]

Rather, Lead Plaintiff makes only conclusory allegations to the effect that Andersen is trying "to escape liability" by, for example, pursuing a "breakup strategy." See Ex Parte App. at 1, 3, 15. Such allegations bear no weight, no matter how often they are repeated. "Conclusory allegations are not sufficient to support a claim for injunctive relief." Williams v. Price, 2001 WL 257931 (N.D. Tex. March 9, 2001), at *1 (citing Hancock v. Essential Resources, Inc., 792 F. Supp. 924, 926 (S.D.N.Y. 1992)) (denying preliminary injunctive relief where "[t]he only evidence offered by plaintiffs in support of their motion are the self-serving and conclusory statements contained in their affidavits"). And conclusory allegations certainly do "not provide a basis for concluding that [a] defendant is attempting

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[7]For example, Lead Plaintiff observes that Andersen recently announced a Memorandum of Understanding with Deloitte & Touche, LLP ("Deloitte"), regarding a move of tax partners and tax professionals from Andersen to Deloitte. Ex Parte App. at 3. Lead Plaintiff never claims, however, that Andersen would not receive fair value for the transaction should it come to fruition, nor would it have any basis for doing so. Moreover, as Lead Plaintiff is well aware, and as is discussed more fully in the affidavit of Bryan Marsal, and in point II.C., infra, the greater the threat of uncertainty or delay in connection with any asset transfer that Andersen LLP may be able to negotiate, the less value Andersen LLP will be able to extract from its assets. In the current environment, time does not work to the benefit of Andersen LLP – or, for that matter, its potential creditors.

[8]It is not proper for the Court to take judicial notice of press articles insofar as Lead Plaintiff offers them to prove the truth of the matters asserted therein. See Cofield v. Alabama Public Service Comm'n, 936 F.2d 512, 517 (11th Cir. 1991) ("That a statement of fact appears in a daily newspaper does not of itself establish that the stated fact is 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned'", quoting Fed. R. Evid. 201(b)(2)).

to dissipate or conceal" assets in order to frustrate a future judgment. Newby, 2002 WL 200956, at *16.

Other purported threats to Lead Plaintiff's interests are similarly ephemeral. Lead Plaintiff charges that an injunction is needed to prevent "dissolution" of Andersen LLP. But Lead Plaintiff provides no evidence that any dissolution has even been proposed, let alone that it is likely.

To the extent Lead Plaintiff is concerned about a "spin-off [of] divisions or businesses" outside the United States, that issue does not pose a real threat, for the simple reason that Andersen LLP does not have any power or authority over entities bearing the Andersen name outside the United States. Andersen LLP is a limited liability partnership organized under the laws of the State of Illinois. It is a separate legal entity from Andersen S.C., and the other legal entities which, while sharing the Andersen name and certain other attributes with Andersen LLP, do not have a contractual or parent/subsidiary relationship to it. Each of the foreign firms to which plaintiff refers has a direct relationship with Andersen S.C., but no direct legal relationship with other Andersen firms. Consequently, no single operating firm, including Andersen LLP, has the power to prevent any other Andersen firm from breaking its ties to Andersen S.C. Thus, while Lead Plaintiff devotes much of its brief to the plans of "foreign operations" and Andersen S.C .member firms in Spain, Switzerland, Germany, Singapore, the Philippines, Malaysia, Taiwan, Australia, New Zealand, Hong Kong and China, see Ex Parte App. at 1, 3- 4, such discussion is completely irrelevant to the instant motion against Andersen LLP.[9] Any

[9] The Regents erroneously contend that because the various member firms share a common name and marketing strategy, and because brochures indicate that the various firms work together, (continued...)

injunction purporting to prevent Andersen LLP from "releasing" the member firms from their ties with Andersen S.C. would be futile and meaningless, since any such "release" is not within Andersen LLP's power. "The law does not generally require a gesture of pure futility." Porter v. Ohio Fuel Gas Co., 158 F.2d 814, 817 (6th Cir. 1947); see also Ohio v. Roberts, 448 U.S. 56 (1980).

Finally, Lead Plaintiff's references to cases involving other former Andersen LLP clients likewise do not show that Andersen LLP seeks to avoid liability. In fact, quite the opposite: Lead Plaintiff concedes that Andersen LLP paid significant sums in settlement of those cases. See Ex Parte App. at 2 (stating that "Andersen paid $100 million" to settle Sunbeam litigation; "Andersen paid a $7 million fine" and "contributed $75 million" to a settlement relating to Waste Management). Compare Quantum Corporate Funding, Ltd. v. Assist You Home Health Care Services, 144 F. Supp. 2d 241, 246 (S.D.N.Y. 2001) (noting that defendant "appears to have a history of making judgments uncollectible"). And the purported insolvency of Andersen LLP's insurer only relates to the possibility

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[9](...continued)
there must be a single worldwide "Andersen" entity for all legal purposes. See Ex Parte App. at 7-8. Facile arguments of this nature have been routinely rejected. See, e.g., Reingold v. Deloitte Haskins & Sells, 599 F. Supp. 1241, 1249 (S.D.N.Y. 1984) ("There is no single worldwide [Deloitte Haskins & Sells] firm. Rather, an association known as DH&S International is the only worldwide DH&S entity. DH&S International is an organization composed of a large number of affiliated accounting firms"); Jeffries v. Deloitte Touche Tohmatsu Int'l., 893 F. Supp. 455 (E.D. Pa.) (rejecting plaintiff's claim that "Deloitte Touche Tohmatsu" should be subject to liability as her employer because its name along with that of "Deloitte & Touche" appeared on the firm's letterhead) motion to amend denied, 164 F.R.D. 34 (E.D. Pa. 1995); Goh v. Baldor Elec. Co., No. 3:98-MC-064-T, 1999 WL 20943 (N.D. Tex., Jan. 13, 1999) (finding that Ernst & Young LLP did not have control over Ernst & Young Singapore or Ernst & Young Thailand for discovery purposes.) The fact that various entities share a common name – whether it be Andersen, Deloitte, or Dunkin' Donuts – and operate under common standards and policies is not sufficient to ignore their separate legal status. See, e.g., Wu v. Dunkin' Donuts, Inc., 105 F. Supp. 2d 83, 87-89 (S.D.N.Y. 2000) (citing cases).

that sufficient funds will not be available to satisfy a judgment for damages, a factor already shown to be insufficient in itself to demonstrate a threat of harm for purposes of preliminary relief, and a factor that is less likely to be corrected if this motion is granted. Moreover, it says nothing regarding concealment or dissipation of assets.

C. The Potential Damage to Andersen LLP Far Outweighs Any Threatened Injury to Lead Plaintiff.

Lead Plaintiff's Motion, were it granted, would cause significant injury to Andersen LLP and its creditors by injecting delay and uncertainty into any potential transaction, thus likely diminishing the value of Andersen LLP's assets. This potential damage far outweighs any supposed harm to Lead Plaintiff in the event that injunctive relief is denied. Indeed, the harm to Andersen's creditors and potential creditors would be increased by granting the relief the Regents seek. The relief sought here constitutes exactly the "interfer[ence] in the business affairs of the alleged debtor" that the Supreme Court in Grupo Mexicano cautioned against. Grupo Mexicano, 527 U.S. at 330.

As an initial matter, the relief requested would virtually preclude Andersen LLP from transferring any lines of its business – along with the relevant non-professional personnel or "pyramids" – to potential buyers, even if such transfers were entirely for fair value. See Affidavit of Bryan P. Marsal at ¶¶ 8-12. But with clients leaving the firm in large numbers (thereby creating a lack of demand for Andersen LLP's services), the only way Andersen LLP can derive any real value from those lines of business is precisely by transferring them to willing purchasers. Absent the flexibility to negotiate transfers for fair value, Andersen LLP would be forced to continue paying all its partners and employees even when they are not earning any significant revenues, thereby diminishing the firm's

overall value even further. Therefore, granting the injunction could well have the very effect the Regents claim they are seeking to avoid. See id. at ¶¶ 8-12.

Moreover, even if some partners and employees remained with the firm for some period of time in anticipation of some potential transfer that would help them secure positions, eventually, many would be forced by their own economic circumstances to simply decide to leave the firm on their own. See id. at ¶ 10. The result would be that Andersen LLP would lose its personnel (i.e., its assets) without obtaining any value in return. Only by having the flexibility to address these issues in a manner than makes business sense can Andersen LLP maximize its value while trying to ensure the most productive course of action for all concerned.

Simply put, the relief requested – whether it is labeled an "asset freeze" or maintaining the "status quo" – is prejudicial to Andersen. It is particularly inappropriate for a business confronting the unique, rapidly evolving circumstances that Andersen LLP faces today. Lead Plaintiff would have Andersen LLP stuck in a static mode, unable to address any of the challenges facing it. Far from preserving Andersen's worth, as the Regents claim is their goal, such an injunction would force Andersen LLP to hold on to assets that it cannot fully utilize, while such assets diminish in value. See id. at ¶ 13. Thus, the potential damage to Andersen LLP far outweighs any threatened injury to Lead Plaintiff.

D. The Relief Sought Would Be Adverse to the Public Interest

The Regents have neglected to advance any arguments to meet their burden of showing that the public interest would not be harmed by an injunction. This is hardly surprising, since an injunction inhibiting Andersen LLP's efforts to deal efficiently with all its creditors and meet the challenges confronting it does nothing to advance any public interest. Rather, the Regents' request for an injunction is an attempt to advance their own self-interest of recovering damages for themselves and the members of the putative class, to the detriment of all other creditors of Andersen LLP. See Grupo Mexicano, 527 U.S. at 331 (noting that pre-judgment asset freeze in suits involving only money damages would benefit a few active plaintiffs at the expense of other creditors).

Moreover, Lead Plaintiff's motion totally ignores the significant public interests that would be imperilled by issuance of the injunction; namely, protecting the interests of all parties adversely affected by the present circumstances, and attempting to ensure the stability and smooth functioning of the auditing and other professional services markets in which Andersen LLP operates. The public interest is not served by Andersen LLP's demise, and only a short-sighted plaintiff would contend otherwise. As explained earlier, the injunction sought by Lead Plaintiff would tie Andersen LLP's hands, rendering it unable to respond rapidly to the problems it faces and adding delay and uncertainty to these already difficult circumstances. Rather than granting the injunction, therefore, the Court should permit Andersen LLP to address its current circumstances in as fair and equitable a manner as possible to all interested parties, so that its professional services to its clients, livelihoods for its thousands of employees and partners, and a basis for recovery to all its creditors are not impaired.

III. NO TRO CAN ISSUE ABSENT A SUBSTANTIAL BOND

Federal Rule of Civil Procedure 65(c) requires that applicants for restraining orders or preliminary injunctions must post a bond to protect against damages incurred by a party later found to have been wrongfully enjoined or restrained:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Fed. R. Civ. P. 65(c). See Monzillo v. Biller, 735 F.2d 1456, 1461 (D.C. Cir. 1984) (noting that purpose of security requirement "is to protect a party from damages suffered if it is later determined that the preliminary relief was wrongfully granted"). Contrary to Lead Plaintiff's claim that "no bond is required", Ex Parte App. at 16-17, the posting of a bond is mandatory, and the failure to require a bond or other security in ordering an injunction constitutes grounds for reversal.[10] Phillips v. Chas. Schreiner Bank, 894 F.2d 127, 131 (5th Cir. 1990) (holding that party is not entitled to a preliminary injunction without posting security to indemnify defendant against potential financial loss due to wrongfu injunction). The exact amount of the bond, however, is within the court's discretion. See id. (remanding to district court to set amount of bond).

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[10]Moreover, "[a] party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond." W.R. Grace and Co. v. Local Union 759, 461 U.S. 757, 770 n.14 (1983) (citing Russell v. Farley, 105 U.S. 433 (1882). Andersen LLP therefore seeks a bond now to ensure it has some protection against the significant harm it will suffer if an injunction is issued.

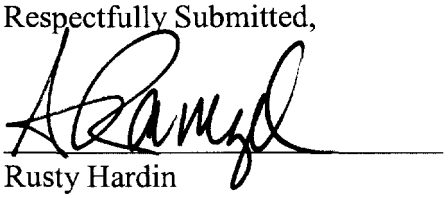
The potential harm resulting from a temporary injunction is precisely the threat against which Rule 65(c) is designed to protect. In this case, the harm inuring to Andersen LLP would be enormous. In the event an injunction is granted (notwithstanding the myriad reasons why such an order should not issue) therefore, the Court should require a substantial bond. Objective quantification of the potential harm to Andersen LLP is difficult, but its provable damages could, in the environment it currently faces, be hundreds of millions of dollars. In an unlikely but not impossible scenario, Andersen LLP's claims against the Regents for injuries suffered as a result of wrongful issuance of a preliminary injunction could be asserted by persons standing in Andersen LLP's shoes. In light of the seriousness of this situation, the Court should require Lead Plaintiff to post a bond of not less than $250 million, itself but a portion of the actual monetary harm that Andersen LLP could suffer if a preliminary injunction is entered.

CONCLUSION

For the foregoing reasons, the Court should deny Lead Plaintiff's Motion for a preliminary injunction.

Dated: Houston, Texas
April 22, 2002

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of April, 2002, the foregoing pleading was served pursuant to the Court's April 5, 2002 Order.

Andrew Ramzel